IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 779

THE AMERICAN TOBACCO CO.; R. J. REYNOLDS TOBACCO CO.; BANK OF GREECE; BROWN & WILLIAMSON TOBACCO CORP.; COMMERCIAL CO. OF SALONICA, LTD.; JOHN D. NICOLAOU and NICHOLAS NICOLAOU, co-partners, doing business as D. Nicolaou Sons & Co.; A. MICHAELIDES, S.A.; and MACANDREWS & FORBES CO.,

Petitioners,

against

J. C., N. C. and A. C. HADJIPATERAS and HELLENIC LINES, LTD.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Opinions Below and Jurisdiction

The facts regarding the opinions below and the jurisdictional requisites are accurately stated in the petition.

The Questions Presented

Contrary to the impression sought to be created in the petition, the only issues in this case are issues of fact. The so-called questions of law, dealing with the Fire Statute

and the fire exception of the Carriage of Goods by Sea Act, can only arise if the factual issues are reexamined and the decision of the Court of Appeals is first reversed on the facts.

Statement

(a) Background

The Katingo Hadjipatera (the ship), owned by the three Hadjipateras brothers (owners), was under charter to Hellenic Lines, Ltd. (charterer), to transport general cargo from Mediterranean ports to the United States via Gibraltar. On October 28, 1940 she was at Piraeus, her last scheduled port of loading, loaded primarily with tobacco and waiting for orders. War broke out between Italy and Greece. On November 2nd the charterer booked and stowed an additional consignment of 1,552 bales of tobacco, of which 139 were placed in the No. 3 tweendeck. Piraeus being under aerial attack, the ship was ordered on November 3 to an outside anchorage. The principal owners of the tobacco, preferring the risks of an equatorial voyage to the probable complete loss of the cargo in Greece, urged the charterer and the Greek Government to send the ship here via Suez and the Cape of Good Hope. The Government ordered the ship in convoy to Port Said and to follow instructions of the British Admiralty for the rest of the voyage. The ship arrived at Newport News, Va., February 26, 1941 after 118 days and two crossings of the Equator, an unprecedented voyage for tobacco. In spite of the arduous voyage, the cargo by and large outturned sound except for damage in or caused by two lots of tobacco which self-heated and some damage, comparatively unimportant, to miscellaneous cargo.

(b) The Essential Findings

The Trial Court found that the ship was in all respects seaworthy, properly manned and equipped, and that her ventilating facilities were adequate and proper; that due diligence to make her so was exercised by the owners at the commencement of the voyage from all loading ports, and that in respect of the care and custody of the cargo and the prosecution of the voyage, the master, under all the circumstances, exercised due diligence, sound discretion and prudent judgment, and took the action he deemed most expedient and in the best interest of all concerned (F. 7, 19, 77-8, 101; 2245-8, 2258, 2262). Two lots of tobacco (Brown Williamson's Cavalla and American Tobacco Company's Volos) self-heated wherever stowed, and no other lots self-heated (F. 88; 2259-60). Part of the Brown Williamson lot was in No. 3 hold; it self-heated and ignited due to spontaneous combustion (F. 85-6; 2259). These two lots were more susceptible to self-heating than other tobacco on the ship (F. 88, 93; 2259-60). Excessive moisture content is a significant causal factor in the self-heating of such tobacco when baled (F. 89; 2260). The stowing of all cargo was entirely under the control of the charterer, whose agent personally directed it and had it done by its employees. The master neither directed nor interfered with the stowage; other than the master no person of authority connected with the vessel owners had personal knowledge of the details of the stow; they took no personal part in the stowage and were unfamiliar therewith. The tobacco was properly stowed, except for the stowing of the additional 136 bales in #3 tweendeck (F. 20-30, 36-40; 2248-2251).

On the basis of these findings the Trial Court decided that the owners were not liable *in personam* for damage to cargo; that there is no liability for damage to the lots

which self-heated; that charterer alone was liable for all damage to other tobacco in No. 3 hold and tweendeck; that there is no liability for damage elsewhere to tobacco which self-heated or to adjacent tobacco damaged as a consequence. Owners' prayer for limitation, as well as for exoneration, was granted, except as to miscellaneous cargo claims, with right of recoupment from charterer. Cargo owners except one were held liable to contribute with the ship owners in general average (conclusions of law 1-16, 2263-5).

(c) The Findings as to No. 3 Tweendeck

The crucial fact in this case is that all tobacco damage was basically caused by the self-heating of two lots of tobacco, and that some of this tobacco, stowed in No. 3 hold, caught fire. Only these two lots, which were more susceptible to self-heating than others similarly stowed, and they self-heated, regardless of where stowed (F. 81-91, 93-4, 2258-61). However, the Trial Court, having found that although No. 3 hold was properly stowed (F. 26, 2249) and that No. 3 tweendeck was originally properly stowed, found that the additional 139 bales of tobacco were stowed in No. 3 tweendeck so "as to block ventilation and deny access to the hold below"; and that therefore "stowage of No. 3 tweendeck was improper and negligent" (F. 28-30, 2249-50).

(d) The Opinion of the Court of Appeals

The Court of Appeals sustained all the findings, except those dealing with the loading of No. 3 tweendeck. It said:

> "Except as to matters discussed in the succeeding paragraphs, we think the evidence amply supports

his (the Trial Judge's) findings, and that those findings justify his legal conclusions. * * *

> No liability could be imposed [as to fire damage] unless the owners of those goods carried the burden of proving that the fire was caused by the shipowner's design or negligence or the carriers' actual fault or privity. *Haskyn & Co.* v. *Silver Line,* 143 F. (2d) 462 (C. A. 2). The trial judge, on the evidence, correctly held that this burden had not been carried with respect to the shipowners" (2346-7).

Thus, in any event, there can be no issue as against these respondents.

The Court of Appeals then proceeded to analyze the findings relating to No. 3 tweendeck. After stating that they imply that the stowage had been proper before the addition of the 139 bales and after pointing out that "the trial judge was mistaken" as to the meaning and inferences to be drawn from evidence on which he had relied (2347), the Court of Appeals went on to say:

> "the crucial question is this: Is there substantial evidence that the 139 bales were so stowed as to impede the presumably adequate ventilation existing theretofore? We think not. * * * The trial judge found that there had been no negligence in the stowage of No. 3 tweendeck and No. 3 hold, before the 139 bales were added; this seems to imply that it was not necessary, for adequate ventilation and inspection of the cargo in No. 3 hold, to leave a vertical shaft, in the way of the weather deck hatch, down to No. 3 hold. In any event, the 139 bales, if superimposed on other cargo already properly stowed, could not have sealed off such a shaft" (2348-9).

The Court's conclusion was as follows:

> "Here, then, we are obliged to reject the finding that the stowage of the additional 139 bales in No. 3 tweendeck so impeded ventilation of No. 3 hold as

to cause the fire damage to cargo stowed there. For, at best, that finding rests, not on any direct testimony (i. e. 'testimonial inferences'), but on a pure conjecture, derived indirectly from the testimony. So fragile a support for a trial judge's finding will not suffice.

Since the trial judge correctly found on the evidence that there was no fault in the stowage or care and custody of this tobacco previous to the fire, we conclude that all else aside, the trial judge correctly rejected the contention that exculpation must be denied as to that portion of that tobacco which may have been—or was not proved not to have been—in whole or part damaged (through heat in the course of the voyage or otherwise) before the fire broke out.

It follows that neither the Charterer, the vessel nor her owners are liable to the cargo-owners for the damage to the tobacco stowed in No. 3 hold and No. 3 tweendeck" (2349-50).

Reasons for Rejecting the Petition

(a) The first question presented by the petitioner (pp. 3-8) does not arise unless the facts are not as found by the Court of Appeals.

The Court of Appeals, after re-examining all the facts, concluded affirmatively that there had been no negligence in stowing the cargo in No. 3 hold and in No. 3 tweendeck. No amount of quoting parts of its decision out of context can alter this. Nor is there any doubt as to the meaning of the words "all else aside" in the last quoted excerpt from the opinion of the Court of Appeals. They can only mean that, regardless of the merits of an argument which would, as the trial judge put it, "nullify the Fire Statute in many, if not all, cases of spontaneous combustion—an absurd result", the question does not arise at all; for in any event, after the rejection of the finding dealing with

the stowage of the 139 bales in No. 3 tweendeck, which the Court of Appeals said were based on no evidence, "there was no fault in the stowage or care or custody of this tobacco previous to the fire" (2349-50). It follows inevitably that even assuming the theoretical propriety of separating damage from self-heating and damage from an ensuing fire, there can, in this case, be no liability for the former, unless this Court is willing to re-examine all the facts and reach a different conclusion from that of the Court of Appeals.

(b) The second and third questions presented also require a re-examination of the facts.

These two questions (petition, pp. 8, 12) postulate, contrary to the decision of the Court of Appeals, that there was in fact negligence in the stowage of No. 3 tweendeck. The second point (p. 8) is based on the premise, clearly stated in the point heading: "When fire in a cargo is caused by negligent stowage. . . ." The foundation of the argument in support of this point is that "the court (of Appeals) held the view that before there could be any recovery your petitioners were obligated to prove with meticulous care exactly where every shipment of cargo was stowed" (p. 11). The Court of Appeals expressed no such "view". What it said was that it could not accept cargo's theoretical suggestion "that 139 bales were so stowed that, in some *other* way, they impeded ventilation", in the absence of "substantial evidence to show exactly where they were stowed" (2349). Thus, the argument in support of the second point not only presupposes a reversal on the facts, but is based on a misinterpretation of the decision of the Court of Appeals; it thus collapses of its own weight.

The third point heading (p. 12) is a theoretical question relating to tobacco which may heat spontaneously "if not properly cared for", and the discussion assumes that "im-

proper stowage was a proximate cause of the damage" (p. 13) and that "negligent stowage was the principal cause" of the fire (p. 14). Again, therefore, it is assumed that this Court will review the record and find that the stowage was in fact negligent.

(c) The points raised are of no general importance.

For many years, the courts and the bar have assumed that the Fire Statute applies to all fires, whether or not caused by spontaneous combustion. Even assuming, therefore, that petitioners' theory of separability (characterized by the trial judge as "absurd") is even arguable, it is hardly one of such importance that it would warrant action by this Court at this time, particularly in the absence of any conflict between decisions of different circuits. No such conflict is even alleged to exist.

The second and third questions presented, even if they did not require a complete re-examination of the facts, seem to involve elementary questions of burden of proof and burden of going forward, again hardly questions of such importance as to justify review by this Court.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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